No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS, INC., *et al.*,

Petitioners,

v.

GROKSTER, LTD., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE THE AMERICAN CONSERVATIVE UNION AND THE NATIONAL TAXPAYERS UNION IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether the district court and the Ninth Circuit correctly concluded that Congress, rather than the courts, should decide whether and how to expand the scope of the statutory copyright monopoly to reach new technologies that have substantial non-infringing uses.

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INTEREST OF *AMICI CURIAE*

Founded in 1964, the American Conservative Union ("ACU") is the nation's oldest and largest conservative lobbying organization.[1] ACU supports capitalism, traditional moral values, commitment to a strong national defense, and jurisprudence based on the original intent of the framers of the Constitution.

The 350,000-member National Taxpayers Union ("NTU") is America's largest citizen taxpayer group. NTU is a non-partisan citizen group founded in 1969 to work for lower taxes and smaller government.

Because of their support for capitalism, entrepreneurship, and innovation, ACU and the NTU have a strong interest in the maintenance of the "capable of substantial noninfringing use" doctrine (the *Sony* doctrine) put forward in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony*").

The *Sony* doctrine is the basis for the extraordinary flowering of technology and innovation that has characterized the American economy for the last 20 years. Under the protective umbrella of the *Sony* doctrine, America's best and brightest entrepreneurs have introduced ingenious new products that have added billions of dollars to the U.S. economy while increasing the quality of life of American consumers.

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1. Pursuant to Rule 37.3, the parties have consented to the filing of this brief, and their consent letters have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

In an information-technology-driven economy, we can ill-afford to chill innovation by placing unnecessary and unworkable legal constraints on inventors and technologists. Adoption of Petitioners' proposed radical departure from the *Sony* doctrine would stifle innovation, increase costs to consumers and entrepreneurs, and cause significant and unnecessary harm to the economy and the public.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over 120 years ago, in *Baker v. Selden*, 101 U.S. 99 (1879), the Court, for the first time, confronted (and rejected) an attempt by a copyright holder to transform and extend his monopoly rights in the market for *creative* works into a monopoly over the technology he described. The copyright holder, Selden, was the author of a book describing a new system of double-entry bookkeeping. His exclusive right to copy and distribute the book was unquestioned. See *id.* at 101-02 (stating that there is "no doubt" that a "work on the subject of bookkeeping ... . may be the subject of copyright," if it is "claimed only as a book"); *id.* at 104 ("[N]o one has a right to print or publish [Selden's] book, or any material part thereof, as a book . . ."). But Selden also asserted not merely the exclusive right to copy the book, but the exclusive right to copy the bookkeeping *system* described in the book. *See id.* at 101 (defining the question presented as "whether the exclusive property in a system of book-keeping can be claimed, under the law of copyright, by means of a book in which that system is explained").

The Court rejected Selden's claim. It held that Selden's right to control the reproduction and distribution of the *book* did not extend beyond the market for books about bookkeeping, and gave him no rights to control the

reproduction and distribution of the systems, processes, or other technologies described *in* the book. *Id.* at 104.

To hold otherwise, the Court explained, would constitute "a surprise and a fraud upon the public," *id.* at 102, for exclusive rights in the systems and processes are "the province of letters-patent, not of copyright":

> The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government.
>
> . . .
>
> The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described . . . .
>
> . . .
>
> The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them . . . .

Id. at 102-03.

This story was repeated in 1983, when copyright holders again asked this Court to extend the reach of their copyright monopoly beyond the statutory boundaries and to grant them

patent-like rights to control the reproduction and distribution of technologies outside of the market for creative works. In *Sony*, the owners of copyrighted motion pictures and television programs sought to hold the provider of potentially infringing technology (the videocassette recorder) liable as a "contributory infringer," and thereby to enjoin not the reproduction and distribution of their copyrighted works[2] but, rather, the manufacture and distribution of patentable *machines*. 464 U.S. at 417.

The Court again rejected the attempt. Looking to patent law and the doctrine of "contributory patent infringement," for assistance in resolving plaintiffs' copyright claims, the Court noted that the doctrine of contributory patent infringement "has always recognized the critical importance of not allowing the patentee to extend his monopoly beyond the limits of his specific grant." *Id.* at 441. Precisely because a finding of contributory infringement necessarily expands the scope of a patentee's monopoly—as the Court put it, a finding of contributory infringement "give[s] the patentee effective control" over the defendant's product, *id.*, and is "the functional equivalent of holding that the disputed article is within the monopoly granted to the patentee," *id.*—the

2. As the Court in Sony observed:

> The two respondents in this case do not seek relief against the Betamax users who have allegedly infringed their copyrights. Moreover, this is not a class action on behalf of all copyright owners who license their works for television broadcast, and respondents have no right to invoke whatever rights other copyright holders may have to bring infringement actions based on Betamax copying of their works.

464 U.S. at 434.

law of contributory patent infringement places an extremely high burden on the patentee if he is to prevail in such an action:

> These [contributory patent infringement] cases deny the patentee any right to control the distribution of unpatented articles unless they are unsuited for *any commercial noninfringing use.* Unless a commodity has *no use* except through practice of the patented method, the patentee has no right to claim that its distribution constitutes contributory infringement. To form the basis for contributory infringement the item must almost be uniquely suited as a component of the patented invention. [A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce.

Id. at 441-42 (internal quotation marks and citations omitted) (emphasis added) (second alteration in original).

And surely, the Court continued, a sensible doctrine of contributory *copyright* infringement should take even greater care to insure that copyright holders get no greater ability to extend their *copyright* monopoly into *patent*-like rights to control the distribution of *unpatented* machines. It would be "extraordinary," the Court wrote, "to suggest that the *Copyright Act* confers upon all copyright owners collectively, much less the two respondents in this case, the exclusive right to distribute [videocassette recorders] simply because they may be used to infringe copyrights." *Id.* at 441 n.21 (emphasis added).

Extraordinary, even absurd—but that was the "logical implication," *id.*, of the copyright holders' claim in *Sony*, and it is the logical implication of Petitioners' claim here. Petitioners seek, in effect, a declaration that peer-to-peer file-sharing technologies are within their statutory copyright monopoly, that they can exclude others from distributing these technologies, and that, therefore, the developers and distributors of these technologies must obtain Petitioners' permission before distributing any such services or systems. The Court should see this for what it is—an attempt to leverage a lawful, but statutorily limited, monopoly over the distribution of expressive "works of authorship," 17 U.S.C. § 102(a) (granting copyright protection to "original works of authorship fixed in any tangible medium of expression"), into an unwarranted and anti-competitive monopoly over the distribution of innovative technologies. In other words, Petitioners attempt to gain, through the Copyright Act, patent-like protection over technology that Petitioners did not invent and that has not been subject to the examination of the Patent Office. It would be a "surprise and a fraud upon the public" if the Court were to go along with this scheme, and the Court should not condone it. *See Baker*, 101 U.S. at 102.

ARGUMENT

I. THE *SONY* STANDARD, AS INTERPRETED BY THE NINTH CIRCUIT, GIVES APPROPRIATE WEIGHT TO THE PUBLIC INTEREST IN THE FREE FLOW OF INNOVATIVE TECHNOLOGY.

All parties agree that the *Sony* Court engaged in a "balancing of interests" in determining whether, and how, to apply the "staple article of commerce" doctrine to copyright infringement claims, and that the nature of that balancing must guide the Court's resolution of this case. Disagreement centers on whose interests weigh in that balance and on how the *Sony* scales are constructed.

Petitioners and their *amici* claim that *Sony* requires the Court to balance two separate interests: the rights of copyright holders, on one hand, and the rights of technology innovators, on the other. *See* Mot. Picture Studio and Recording Co. Pet'rs' ("MPRC") Br. 2 ("*Sony-Betamax* calls for a balance between 'effective—and not merely symbolic—protection' of copyright, and 'the rights of others freely to engage in substantially unrelated areas of commerce.'" (*quoting Sony*, 464 U.S. at 442)).

But the *Sony* Court could not have been clearer: a third interest—the *public* interest—has to be included in the contributory infringement balance. "When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe . . . the public interest in access to that article of commerce is *necessarily* implicated." *Sony*, 464 U.S. at 440 (emphasis added).

The "public interest" to which the Court referred is not merely the general and abstract public good that all copyright law must promote (as a consequence of the constitutional command that copyright law "promote the Progress of Science," U.S. CONST., art. I, §8, cl. 8). *See Sony*, 464 U.S. at 432 ("The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors."). The public interest, in this case, is the interest that the owner of each of the 11 million mobile audio devices sold in the last year in the United States has in the continuing availability of innovative file-searching and file-management tools and the interest that each of the entrepreneurs attempting to develop innovative new products for that market, has in the outcome of this litigation. Even by Petitioners' own estimates, *hundreds of millions* of legal file transfers take place each month over Respondents' networks[3]; the "public interest" in this case must include the consumers, software developers, and service providers who participate in those file transfers and whose reasonable expectations are that those *lawful* activities can continue.

And the public's interest includes the interests of those participating in what the *New York Times*, just four days

3. Petitioners assert that "[a]t least 90% of the material on [Respondents'] services is infringing," MPRC Br. 2, and that "more than 2.6 billion infringing music files are downloaded each month," *id.* at 12. If those 2.6 billion file transfers represent 90% of the traffic on Respondents' system, that means that over 280 million lawful transfers occur each month.

before this brief was submitted to the Court, describes as an entirely new *industry*—"podcasting"—that is emerging to serve growing consumer demand for better, more efficient, and more personalized music file distribution. *See* John Markoff, *For a Start-Up, Visions of Profit in Podcasting*, N.Y. TIMES, Feb. 25, 2005, at C1. Leveraging off of the extraordinary explosion in demand for mobile digital audio players (over 11 million of which are already in the hands of consumers) and the many Internet-enabled technologies (including Respondents') for finding and distributing digital audio files, "podcasting" enables individual consumers to create personalized downloadable audio programming for distribution to others—everything from "living-room ramblings to BBC newscasts," along with "text-to-speech software for listening to written material plucked from the Web." *Id.*

Podcasting, of course, is merely one of innumerable examples of innovative technology that builds upon, and interacts with, the peer-to-peer distribution networks of the kind that Respondents have enabled. Millions of Americans are engaged in the business of building, developing, and using these technologies, and every one of them—every podcaster, every *potential* podcaster, every potential consumer of podcasting services, and every owner of an iPod or other mobile digital audio device—has a real and concrete stake in this litigation, an interest that the Court must take into account.

The *Sony* Court did more than pay lip service to this public interest; it expressly recognized that the public's interest in free access to innovative technology tilts the scales of the contributory infringement balancing test against Petitioners. The Court explicitly rejected the suggestion that

contributory infringement would lie wherever "'infringing uses outweigh noninfringing uses'" or that its decision had to be based on predicting "'the future percentage of legal versus illegal home-use recording.'" 464 U.S. at 444 (*quoting Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 468 (C.D. Cal. 1979), *aff'd in part & rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984)). It refused to inquire into whether Sony had knowledge that the reproduction of copyrighted materials was "the most conspicuous use" or "the major use" of Sony's Betamax videocassette recorder. *Id.* at 439 (internal quotation marks omitted).

Instead, it held that only technology that was "unsuited for *any* commercially significant non-infringing use" could be brought under the copyright holder's monopoly control via an action for contributory infringement and, conversely, that technology that is "merely ... capable of substantial noninfringing uses" is and must remain outside of that control. *Id.* at 441 (emphasis added). "'[S]ale of an article which though adapted to an infringing use *is also adapted to other and lawful uses*, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce.'" *Id.* at 441-42 (quoting *Henry v. A. B. Dick Co.*, 224 U.S. 1, 48 (1912), *overruled on other grounds, Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917)) (emphasis added).

Petitioners, not surprisingly, want to re-engineer the *Sony* scales. By ignoring the *Sony* Court's explicit command that the *public's* interest in access to, and in the free flow of, products and services that Respondents have placed on the market be weighed in the contributory infringement balance, they propose a standard whereby technologies would be

deemed unlawful whenever their "primary" or "principal" use is to infringe copyright. *See*, *e.g.*, MPRC Br. 18-19 ("Where a service is used *principally* for infringement ... *Sony-Betamax* does not provide it immunity." (emphasis added)); *id.* at 31 ("Under the principles articulated in *Sony-Betamax*, the staple article of commerce defense should not apply when *the primary or principal use* of a product or service is infringing." (emphasis added)).

Were Petitioners' and Respondents' interests the only ones to be considered in this case, a "primary" or "principal" use standard might seem to be a reasonable means of "balancing" one against the other. Such a standard, however, gives virtually no weight at all to the third interest—the public's—on which the *Sony* Court placed so much emphasis. The logical implication of Petitioners' position is that even if *2.5 billion* lawful file transfers took place each month on Respondents' system, insofar as the "primary use" of that system would still be for infringing activity,[4] the Court should hold each of those lawful file transfers hostage to the interest of the copyright holders.

Such a rule would not only "block the wheels of commerce," *Sony*, 446 U.S. at 441 (quoting *Henry*, 224 U.S. at 48), but it would be manifestly unfair to technology developers and providers, who would be liable for indirect infringement not because of any actions they have taken (or omitted), but because of their end users' decisions to use a device primarily for illegal purposes. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002) ("There are many things innocent in themselves, however, such as cartoons,

4. *See supra* note 3 (referring to Petitioners' estimate that 2.6 billion infringing files are transferred on Respondents' system each month).

video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused.").

For these reasons, the Court should decline Petitioners' invitation to water down and re-examine *Sony*'s carefully crafted balancing test and affirm the Ninth Circuit's judgment that, because Respondents' networks are manifestly capable of substantial non-infringing uses, they are within the *Sony* safe harbor.

II. THE COURT SHOULD REJECT ANY ALTERATION IN THE *SONY* TEST FOR CONTRIBUTORY COPYRIGHT INFRINGEMENT ABSENT EXPLICIT GUIDANCE FROM CONGRESS.

"Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology." *Sony*, 464 U.S. at 431.

The Court's reluctance to "expand the protections afforded by the copyright without explicit legislative guidance," *id.* at 431, or to "alter the delicate balance" of copyright law when faced with rapid technological change, *Eldred v. Ashcroft*, 537 U.S. 186, 205 n.10 (2003), are "recurring theme[s]" in its copyright jurisprudence, *Sony*, 464 U.S. at 431; *see, e.g.*, *Eldred*, 537 U.S. at 218 ("The Copyright Clause . . . empowers Congress to define the scope of the substantive right. *See Sony*, 464 U.S. at 429. Judicial deference to such congressional definition is 'but a corollary

to the grant to Congress of any Article I power.'" (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966))); *Teleprompter Corp. v. Columbia Broad. Sys.*, 415 U.S. 394, 414 (1974) (observing that "shifts in current business and commercial relationships" within the cable television industry, "while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation" and that "[d]etailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress"); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401-02 (1968) ("declin[ing] the invitation" put forward by the Solicitor General in an *amicus curiae* brief to "render a compromise decision in this case that would . . . accommodate various competing considerations of copyright, communications, and antitrust policy" and noting that "[t]hat job is for Congress").

Amici respectfully suggest that the Court is unlikely to hear any case where deference to congressional action is more appropriate than this one. For more than twenty years, the *Sony* rule has provided a bright-line standard for copyright holders and technology innovators, and has helped usher in an era of unprecedented technological innovation and economic prosperity for *both* the entertainment and technology industries. Any change in that rule, such as the one Petitioners here propose, must come from Congress. As the Court has recognized many times, only Congress has the institutional competence to accommodate fully the various competing interests that are inevitably implicated by new technologies. If the *Sony* safe harbor rule needs to be changed, Congress is the appropriate body to consider such changes, for only it can hear from the many stakeholders who will be affected by such a change.

Against the background of *Sony's* rule of contributory copyright infringement, Congress has been extraordinarily active in considering a vast range of proposals to address questions of third-party liability for copyright infringement and in enacting many of those proposals into law.[5] Moreover,

5. *See* Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321 (2002) (amending 17 U.S.C. § 114); Technology, Education and Copyright Harmonization Act of 2002, Div. C, Title III, Subtitle C of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273 (2002) (amending 17 U.S.C. ch. 1); Intellectual Property and High Technology Technical Amendments Act of 2002, Div. C, Title III, Subtitle B of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273 (2002) (amending 17 U.S.C. ch. 1); Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160 (1999) (amending 17 U.S.C. ch. 5); Satellite Home Viewer Improvement Act of 1999, Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113 (1999) (amending 17 U.S.C. chs. 1, 5, 12, 13); Computer Maintenance Competition Assurance Act, Title III of the Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304 (1998) (amending 17 U.S.C. § 117); Online Copyright Infringement Liability Limitation Act, Title II of the DMCA, Pub. L. No. 105-304 (1998) (adding 17 U.S.C. § 512); WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Title I of the DMCA, Pub. L. No. 105-304 (1998) (adding 17 U.S.C. ch. 12); DMCA, Pub. L. No. 105-304 (1998) (amending 17 U.S.C. §§ 108, 112, 114, chs. 7, 8); No Electronic Theft (NET) Act, Pub. L. No. 105-147 (1997); Legislative Branch Appropriations Act, 1997, Pub. L. No. 104-197 (1996) (adding 17 U.S.C. § 121); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39 (1995) (amending 17 U.S.C. §§ 114, 115); Uruguay Round Agreements Act, Pub. L. No. 103-465 (1994) (amending 17 U.S.C. § 104A and adding 17 U.S.C. ch. 11); Satellite Home Viewer Act of 1994, Pub. L. No. 103-369 (1994) (amending 17 U.S.C. §§ 111, 119); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182 (1993) (amending 17 U.S.C. § 109 and adding 17 U.S.C.

(Cont'd)

Congress is well aware of the specific technologies at issue in this case; during the pendency of this proceeding, Congress has held no fewer than eight hearings on peer-to-peer file-sharing, and has heard from the recording industry, performing artists and composers, new entrants to the digital music business, public interest advocates, technology developers, academics, non-profits, and executive branch officials regarding the myriad social and economic costs and benefits associated with this technology.[6] If a change is needed in the *Sony* standard, it should come as a result of legislative action, not judicial decree.

(Cont'd)

§ 104A); Audio Home Recording Act of 1992, Pub. L. No. 102-563 (1992) (adding 17 U.S.C. ch. 10); Pub. L. No. 102-561 (1992) (amending 18 U.S.C. § 2319); Pub. L. No. 102-492 (1992) (amending 17 U.S.C. § 107); Semiconductor International Protection Extension Act of 1991, Pub. L. No. 102-64 (1991) (amending 17 U.S.C. ch. 9); Computer Software Rental Amendments Act of 1990, Title VIII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650 (1990); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 (1988) (amending 17 U.S.C. § 912); Satellite Home Viewer Act of 1988, Title II of Pub. L. No. 100-667 (1988); Pub. L. No. 100-159 (1987) (amending the Semiconductor Chip Protection Act of 1984, 17 U.S.C. ch. 9); Pub. L. No. 99-397 (1986) (amending 17 U.S.C. §§ 111, 801); Semiconductor Chip Protection Act of 1984, Title III of Pub. L. No. 98-620 (1984) (adding 17 U.S.C. ch. 9); Record Rental Amendment of 1984, Pub. L. No. 98-450 (1984) (amending 17 U.S.C. §§ 109, 115).

6. *See Protecting Innovation and Art While Preventing Piracy: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004); *Peer to Peer File Sharing: Hearing Before the Subcomm. on Competition, Infrastructure, and Foreign Commerce of the Comm. on Commerce, Science, and Transp.*, 108th Cong. (2004); *The Dark Side of a Bright Idea: Could Personal and National Security*

(Cont'd)

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Ninth Circuit should be *affirmed*.

Respectfully submitted,

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(Cont'd)
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